U.S. Senate
Republican Policy
Committee

Legislative Notice

Jon Kyl, Chairman

No. 69 July 12, 2004

S.J. Res. 40 — The Federal Marriage Amendment

Calendar No. 620

The Federal Marriage Amendment was read the second time on July 8, 2004, and placed on the Senate Legislative Calendar under General Orders.

Noteworthy

- Today the Senate is debating the motion to proceed to the consideration of S.J. Res. 40, the Federal Marriage Amendment. At press time, there was no time agreement for the consideration of this amendment to the U.S. Constitution.
- S.J. Res. 40 was introduced July 7, 2004, with 18 cosponsors. It is identical in every respect to S.J. Res. 30, which was introduced by Senator Allard on March 22, 2004, and referred to the Judiciary Committee. Also, S.J. Res. 40 is similar (but not identical) to H.J. Res. 56, which was introduced by Rep. Musgrave (R-CO) on May 21, 2003, and has 126 cosponsors.
- The Judiciary Committee (or its Constitution Subcommittee) has held four hearings since last September related to the need for a constitutional amendment to define and protect traditional marriage – September 4, 2003, March 3, 2004, March 23, 2004, and May 20, 2004.
- In addition, three other hearings were held that addressed the importance of preserving traditional marriage. Those hearings were in the Finance Subcommittee on Social Security and Family Policy (May 5, 2004, chaired by Senator Santorum), the HELP Subcommittee on Children and Families (April 28, 2004, chaired by Senator Sessions), and the Commerce Subcommittee on Science (May 13, 2004, chaired by Senator Brownback). All told, 40 witnesses have offered testimony to the Senate during this Congress on the importance of preserving and protecting traditional marriage.
- Proponents of this constitutional amendment, including President Bush, contend that it is the only legislative option available to prevent activist lawyers and judges from imposing same-sex marriage on all the states. That is, failure to enact a constitutional amendment will result in national, court-imposed same-sex marriage — despite the wishes of most Americans. As the President noted, “The future of marriage in America should be decided through the democratic process, rather than by the court orders of a few.”

Summary of S.J. Res. 40

S.J. Res. 40 reads, in full:

> Marriage in the United States shall consist only of the union of a man and a woman.
>
> Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

The First Sentence

The first sentence provides a common definition of marriage throughout the United States — one man and one woman. Individual states would not be able to override this shared definition. Inconsistent definitions state-to-state on the core characteristic of marriage would be unworkable legally and culturally.

The Second Sentence

The second sentence of the amendment guards against judges who would construe state or federal constitutions in order to require the creation of "civil unions" or "domestic partnerships" — "marriages" in all but name only — despite the fact that the voters or elected legislators never created those institutions.

S.J. Res. 40 *does not* prohibit the citizens of a state from acting through a legislative process to grant whatever benefits or statuses they want for same-sex couples in that state. Nor does it prevent employers from granting whatever benefits they want to same-sex couples. What it prevents is judicially imposed rules governing the allocation of benefits to same-sex couples.

Background

This proposal to amend the U.S. Constitution is a defensive response to an ongoing campaign in the nation's courts to rewrite the nation's marriage laws. Federal Marriage Amendment ("FMA") proponents believe that state marriage laws will continue to suffer the fate that Massachusetts's marital institution did when that state's high court ruled that traditional marriage laws were unconstitutional. Moreover, proponents believe that the growing number and intensity of lawsuits throughout the nation challenging the federal Defense of Marriage Act ("DOMA"), state marriage laws, and even state constitutional amendments demonstrates that only a constitutional amendment will protect marriage as between a man and a woman.

The Activists' Campaign: From Vermont to Massachusetts

The same-sex marriage activists' campaign began in Alaska and Hawaii in the early 1990s, but found its first major victory in Vermont in 1999. In response to a suit by the ACLU

and the other activist groups, the Vermont state supreme court ordered the legislature to recognize same-sex marriage or to create some form of "civil union" that was exactly like marriage. Vermont citizens at the time opposed both same-sex marriage and civil unions, but the court mandate was clear: legislators must create same-sex marriage or some form of same-sex "civil union," or the court would do it for them. The legislators chose civil unions, but only in light of the state supreme court's dictate.

These same activist groups next turned their efforts to a lawsuit in Massachusetts, where they calculated that the state supreme court would be amenable to their pleas. The people of Massachusetts opposed same-sex marriage, and their legislators had no plans to change the laws to allow it, but the activists were not focused on a democratic solution. They knew they could not convince many millions of citizens to undermine traditional marriage, so they decided to focus on just four people: a majority of the supreme court of the state.

Their calculation was successful. A 4-3 majority of the Supreme Judicial Court of Massachusetts ruled last November in *Goodridge v. Massachusetts Dep't of Health*, 798 N.E. 2d 941 (Mass. 2003), that the state's refusal to issue marriage licenses to same-sex couples violated the state constitution. The court concluded that to insist on traditional marriage was to engage in "invidious" discrimination that the court would not tolerate. Further, the court wrote that there was "no rational reason" to preserve traditional marriage laws, that support for traditional marriage was rooted in little more than "persistent prejudices," and that the several-thousand-year-old institution of marriage was little more than an "evolving paradigm" that could be recrafted and rewritten by courts whenever they so desired. In a follow-up opinion reaffirming and expanding the earlier decision a few months later, the same four judges even said that the marriage laws of Massachusetts were a "stain" on the constitution and that the "stain" must be "eradicated" by the court. The court went so far as to suggest that it would be better to abolish civil marriage altogether rather than preserve it in its traditional form.

On May 17 of this year, the Goodridge decision took effect, and the state began issuing same-sex marriage licenses in Massachusetts. Many same-sex couples from other states traveled to Massachusetts and returned to their own states. Meanwhile, the Massachusetts legislature has given preliminary approval to a state constitutional amendment to return marriage to its traditional meaning, but it will be more than two years before citizens can vote on that amendment. In the meantime, same-sex marriage is a reality.

The Campaign Continues

At the same time, some local officials in New York, California, New Mexico, and New Jersey have announced their intention to violate state marriage laws and issue marriage licenses to same-sex couples. After city officials in San Francisco and county officials in Portland, Oregon, started giving out these licenses, same-sex couples from at least 46 states traveled to those states (along with Massachusetts), received licenses, and returned to their home states. Same-sex couples sporting marriage licenses are, therefore, in nearly every state already.

The activists' Massachusetts victory was a stepping-off point for further lawsuits. There are now more than 35 lawsuits pending in 11 states across our nation in which states' marriage laws have been challenged as unconstitutional — states like California, Florida, Indiana, Maryland, Nebraska, New Jersey, New Mexico, New York, Oregon, Washington, and West

Virginia. Many of these lawsuits are brought by the same lawyers who filed suit in Vermont and Massachusetts — activists from the ACLU, Lambda Legal, and GLAD, in particular.

Many more lawsuits will surely follow. Consider the following examples.

First, as noted above, the activists will file more lawsuits challenging state marriage laws, the same way they did in Massachusetts and are doing in 11 other states today.

Second, there will be lawsuits seeking to strike down the Defense of Marriage Act so that same-sex couples can get access to federal benefits such as tax-filing status, Social Security benefits from same-sex partners, and many of the other benefits or rights that the federal government grants to married spouses. Already, for example, there are lawsuits pending in Florida and Washington that directly claim that DOMA is unconstitutional.

Third, these activists will file lawsuits trying to force other states to recognize the same-sex marriages in Massachusetts and any other place where they can convince judges to change the marriage laws against the people's will. Such a lawsuit is currently pending in Washington state, where a same-sex couple received a marriage license in Oregon and now insists that Washington must recognize that "marriage" despite clear state law to the contrary.

Finally, there will be many other lawsuits that cannot be anticipated but that will happen as same-sex "married" couples move from state to state, as so many Americans do nowadays. These couples will try to get divorced when marriages fail; they will try to execute and enforce wills when one of them dies; they will have run-of-the-mill business disputes. Courts will struggle to figure out how to treat their legal relationships when these disputes arise, and those struggles will take on a constitutional dimension. For example, two women who received a marriage license in Canada later decided to declare bankruptcy in Washington State. They filed their petition jointly, as though they were married. Because all bankruptcies are filed in federal court, pursuant to federal law, the Defense of Marriage Act is implicated. The bankruptcy trustee has objected to their joint petition, citing DOMA's provision that for the purposes of all federal law, marriage is the union of a man and a woman. The bankruptcy petitioners now argue that DOMA itself is unconstitutional and that the bankruptcy court must recognize the Canadian same-sex marriage. Thus, a simple bankruptcy petition has taken on constitutional dimensions.

Cases such as these will proliferate, some filed by activists and some filed by citizens just trying to live their lives, as appears to be the case in this bankruptcy petition in Washington State. The result will be tremendous confusion in the courts throughout the nation, as some states recognize same-sex marriage for some purposes while other states recognize them only for other purposes. But as these lawsuits progress, it will be the courts – not the people – who make the decisions on whether same-sex marriage will spread to the entire nation.

Ultimately, the Supreme Court Will Be Asked to Rule

In the not-too-distant future, the legal activists who are managing this challenge to traditional marriage laws will decide that they are ready for the "big case" – the case before the U.S. Supreme Court. They will tell the Supreme Court that the confusion in the states demands a national solution. They will argue that we are one nation, that we cannot long function with such fundamentally inconsistent understandings of marriage. And when that day comes — when the

U.S. Supreme Court is presented with the opportunity to rule traditional marriage laws unconstitutional — it is very possible the Court will side not with the oft-surveyed views of the American people, but, rather, will find a constitutional reason to say the people have been wrong all this time.

Administration Position

The Administration on July 12 released a Statement of Administration Policy (SAP), strongly supporting adoption of S.J. Res. 40. The SAP reads, in full:

> The Administration strongly supports passage of S.J. Res. 40. Marriage has been the foundation of our society and of societies and cultures throughout history — and it has always been defined as the union between a man and a woman. Yet today a few activist judges and local officials have made an aggressive effort to redefine the fundamental meaning of marriage. Without a constitutional amendment, these judges and local officials can continue to attempt to force States to accept same-sex marriages against the wishes of their own citizens. Such judges could even strike down the Defense of Marriage Act, which was passed by an overwhelming bipartisan margin, and declare that all marriages recognized in one State must be recognized as marriages everywhere else. When some judges insist on redefining the fundamental institution of marriage for their states or the entire country, the only alternative left for the people's voice to be heard is an amendment to the Constitution – the only law a court cannot overturn. The future of marriage in America should be decided through the democratic process, rather than by the court orders of a few. The Administration urges members of the House and Senate to promptly pass, and to send to the States for ratification, an amendment to protect marriage.

Other Views

The primary objections to the FMA are as follows:

Not Necessary Because Better Handled State-to-State — The most common argument against the FMA is that each state should be able to have its own position on same-sex marriage, that there is no harm in Massachusetts having one rule while other states disagree. *In theory*, this may be correct, although many FMA proponents believe that same-sex marriage anywhere in the United States undermines traditional marriage itself and may lead to a decline in the traditional family structure. Equally importantly, FMA proponents assert that this argument completely ignores the reality of the same-sex marriage advocates' campaign through the courts. That campaign is designed to impose same-sex marriage on *all* the nation, regardless of whether the state is amenable (in Massachusetts, for example, the electorate had no voice in this policy decision). Advocates are candid about their intention to build their case in the courts on a state-by-state basis, and then to bring a carefully staged case to the Supreme Court when they deem the timing best. Thus, there can be no state-by-state solution, because the end result of doing nothing is court-imposed same-sex marriage nationwide.

Not Necessary Because Marriage Laws Will Not be Struck Down — Some argue that the FMA is not necessary because courts will not strike down traditional marriage laws. This argument brushes over the Massachusetts court's edict, and ignores the more than 35 lawsuits pending in 11 states that challenge traditional marriage laws. Moreover, this argument appears to be grounded in unfamiliarity with the litigation strategy of same-sex marriage advocates, candidly stated by leaders of Lambda Legal, the ACLU, Freedom to Marry, and other groups.

Premature Because Only Massachusetts Affected — Some argue that the amendment is premature because same-sex marriage has been imposed on only one unwilling electorate, that of Massachusetts. First, as a factual matter, the supreme court of Vermont imposed same-sex "civil unions" on that state in 1999. Second, this argument neglects the campaign through the courts mounted by the same-sex marriage activists. Third, it would be grossly unfair to all Americans to wait until all traditional marriage laws have been struck down before the people were given the opportunity to speak through the constitutional amendment process.

Premature Because DOMA Not Struck Down — Some argue that the Defense of Marriage Act, passed overwhelmingly in 1996, is sufficient to block the spread of same-sex marriage. First, DOMA does not stop one state court from overriding the wishes of the citizens of that state and recognizing an out-of-state same-sex marriage. Second, DOMA does not prevent state or federal courts from redefining marriage. In short, federal DOMA does not trump the U.S. Constitution. That law is already being challenged in Florida and Washington federal courts, in each case on the basis that the U.S. Constitution's equal protection and due process clauses mandate a ruling that DOMA is unconstitutional.

Not Necessary Because Same-Sex Marriage is Good Social Policy — At least one Senator has praised the Massachusetts court decision. Others have said that the FMA should be opposed because same-sex marriage is good social policy. FMA proponents obviously disagree, but also argue that if Senators genuinely believe that same-sex marriage is good social policy, they should be willing to say so. FMA proponents also respond that same-sex marriage should not be imposed by the courts in any case because it is antithetical to a democratic republic to allow fundamental questions of social policy to be decided outside the legislative process. If the people want same-sex marriage, they argue, they should refuse to ratify the FMA when it is presented to their state representatives.